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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 399

SARAH SMITH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN C. SMITH, DECEASED, AND GEORGE THOMAS HOLLEY, PETITIONERS

v.

UNITED STATES OF AMERICA AND MARINE TRANSPORT LINES INC., AS OWNERS OF THE USNS POTOMAC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 30–39) is reported at 237 F. Supp. 434. The majority and dissenting opinions in the court of appeals are reported at 346 F. 2d 449 (Pet. App. 14–30).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1965. The petition for a writ of certiorari was filed on July 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the operating agent of a public vessel owned by the United States is the "agent" of the United States for purposes of the exclusivity provision of the Suits in Admiralty Act, 46 U.S.C. 745.

STATUTE INVOLVED

46 U.S.C. 745:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim * * *.

STATEMENT

This case arises out of the destruction by fire of the USNS POTOMAC, a Navy tanker, while it was delivering a cargo of aviation gasoline and jet fuel for the Defense Department. At the time, the POTOMAC was being operated by the Navy through Marine Transport Lines, Inc., under a cost-plus-fixed-fee contract (Gov't App. 4a–6a).[1] Declared by the contract to be a "public vessel" dedicated to the "public use," the POTOMAC had been employed exclusively to haul petroleum products to military bases for national defense purposes (Gov't App. 2a).

[1] "Gov't App." refers to the Appendix to Brief for Appellees in the court of appeals. "App." refers to the Appendix to Brief for Appellants in the court of appeals. "Supp. App." refers to the Supplementary Appendix to Brief for Appellants in the court of appeals.

1. The standard form contract between the United States and Marine Transport defines a relationship in which Marine Transport is the agent of the United States for purposes of the operation of the USNS POTOMAC. Article 1 of the contract outlines this relationship. Marine Transport undertakes to "manage and conduct the business regarding the operation of such tankers as may be furnished to it by the Government from time to time" (Supp. App. 3). Article 1 goes on to require Marine Transport to authorize the master of the vessel to carry out orders and instructions of the Commander, Military Sea Transportation Service, "as regards employment of the vessel and prosecution of voyages" (Supp. App. 4). The Commander, MSTS, is required by the contract to issue "operating instructions" to Marine Transport (Supp. App. 4). The general operating instructions which have been issued specify that the Commander, MSTS, will issue "operational orders" which will include "loading instructions, amount and types of cargo, sailing orders, diversion orders, and discharge instructions" (Gov't App. 8a, 9a). The operating instructions further provide that the master will report in each port to the Government representative designated by the Commander, MSTS, for "local operational control" (Gov't App. 9a).

Under the remaining terms of the contract, the government agrees to reimburse Marine Transport for its costs, to pay a fixed fee for profit, and to assume the risks of the voyages. The vessels are declared to be owned by the United States as public vessels, employed solely in public use. While the

officers and crew are declared to be employees of Marine Transport, the government retains the right to require the termination of the employment of any individual (Pet. App. 35–39).

Vessels operating under the form of contract here involved are painted navy gray [2] and are required to have their name under the designation "U.S. Naval Ship" painted in white on the bow, port and starboard, on the stern, and on the port and starboard bridge name boards (Gov't App. 8a). These vessels are required to display flags in accordance with United States Navy regulations rather than the merchant marine practice (Gov't App. 10a–11a).

2. Following the disaster the United States and Marine Transport filed a joint petition for exoneration and limitation of liability in the Eastern District of North Carolina (where the wreck was located). The district court entered the customary order under Admiralty Rule 51, directing a monition to issue to all claimants and restraining institution and prosecution of all suits against the United States and Marine Transport in connection with the disaster, except in the limitation proceedings (Gov't App. 11a–13a).

Pursuant to the monition, some 38 claims totalling $2,100,000 were filed, including petitioners' claims. The limitation fund [3] is expected to be slightly in excess of $900,000. Following trial, petitioners moved

[2] MSTS Tanker Operating Instructions, Appendix J, Section A 4 (Aviation Fuel Terminals Ex. #8).

[3] The "limitation fund" paid into court by the shipowner represents the limit of his liability unless the limitation court finds that the shipowner is chargeable with knowledge of the act or condition that caused the accident. 46 U.S.C. 183.

to modify the restraining order to permit them to file separate suits outside the limitation proceedings against Marine Transport.

The district court, after a detailed review of the provisions of the contract between Marine Transport and the United States covering the operation of the USNS POTOMAC, denied both motions on the ground that Marine Transport was an "agent" of the United States within the meaning of the exclusivity provision of the Suits in Admiralty Act, 46 U.S.C. 745, as incorporated in the Public Vessels Act, 46 U.S.C. 782. The Suits in Admiralty Act provides that the remedy against the United States is exclusive of any action arising from the same subject matter against the "agent or employee" of the United States whose act or omission gave rise to the claim.[4] An interlocutory appeal was taken under 28 U.S.C. 1292(b). The court of appeals affirmed, one judge dissenting.

ARGUMENT

The question presented is whether seamen of a vessel owned by the United States and subject to its operational control through a standard contractual agreement with the vessel's operating agent have a remedy only against the United States under the Public Vessels Act for the act or omission of the agent, or whether in addition they have a remedy against the operating agent itself. Petitioners' substantive rights are not affected by this issue, for the United States is

[4] Petitioners were allowed to file protective suits against the United States pending appeal for purpose of tolling the statute of limitations (App. 80–84).

clearly subject to direct liability under that Act for anything that the agent did or failed to do in connection with the operation of the vessel. The chief practical consequence of the decision below is that seamen on such public vessels cannot obtain a jury trial under the Jones Act by suing the operating agent.[5] We submit that further review of this case is not warranted.

1. In the interlocutory posture of the present proceeding, it is entirely possible that petitioners would not be entitled to trial by jury regardless of the decisions below, and hence the question presented may well be academic. The district court noted that the 38 claims filed totalled $2,100,000, as against a limitation fund slightly in excess of $900,000 (Pet. App. 31-32). Thus, even if petitioners were permitted to sue Marine Transport, all claims would have to be tried in the limitation proceeding if Marine Transport's petition for limitation was granted. *Pershing Auto Rentals, Inc.* v. *Gaffney*, 279 F. 2d 546 (C.A. 5); compare *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147. Such a trial would be in admiralty, without a jury, despite the Jones Act. *In re East River Co.*, 266 U.S. 355. If Marine Transport was denied limitation, the question of its responsibility for the disaster would be settled by the judgment in the limitation proceeding, and the issues remaining for trial by jury in separate actions would be limited to causation and damages.

[5] There is, in addition, a two year statute of limitations under the Public Vessels Act, and a three year period under the Jones Act. There is, however, no question of the timeliness of petitioners' claims in this case.

2. Marine Transport was operating the POTOMAC for the benefit and at the expense of the United States and, as the contract and the operating instructions make clear, subject to the detailed control of the United States at all times. See *supra*, pp. 3–4. Within the usual meaning of the word, therefore, Marine Transport was the "agent" of the United States for the operation of the POTOMAC. Indeed, a clearer case of a principal-agent relationship is difficult to imagine.

Petitioners argue, however, that the term "agent" as used in the exclusivity provision of the Suits in Admiralty Act does not refer to an "operating agent" such as Marine Transport, but only to a "general agent" of the type involved in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (*i.e.*, an agent "engaged to take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel" (337 U.S. at 796)). Their argument is based on the view that the statute codified *Cosmopolitan* and its companion cases, which held that the remedy against the United States as owner of a vessel is exclusive in a "general agent" situation. However, the statute was also intended to codify *Johnson* v. *Emergency Fleet Corp.*, 280 U.S. 320, 322–323, 326–327, in which the remedy against the United States under the Suits in Admiralty Act was held exclusive in an "operating agent" situation.*

* See S. Rep. 2535, 81st Cong., 2d Sess., at 2–3, commenting on H.R. 483, which was enacted without pertinent change as 46 U.S.C. 745 in its present form:

"The first proviso declares the rule announced by the Supreme Court in *Cosmopolitan Shipping Co.* v. *McAllister* (337

Thus, Congress did not intend the term "agent" as used in the statute to mean only the "general agent" involved in the *Comopolitan* decision.[7] This is further shown by the fact that the bill as originally introduced specified "a general agent under a general agent service agreement." H.R. 4873, 80th Cong., 2d Sess.; see H. Rep. No. 2060, 80th Cong., 2d Sess., p. 5. But when the bill was finally passed, only the comprehensive term "agent" was used, without limiting language. The distinction between general agents and operating agents had been explicitly made in letters from the Department of Justice reprinted in all of the committee reports. H. Rep. 2060, 80th Cong., 2d Sess., p. 4; H. Rep. 1292, 81st Cong., 1st Sess., pp. 3-4; S. Rep. 1782, 81st Cong., 2d Sess., p. 4; S. Rep. 2535, 81st Cong., 2d Sess., p. 3. Thus the significance of the change from the specific term "gen-

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U.S. 783), *Caldarola* v. *Eckert* (332 U.S. 155), and *Johnson* v. *Emergency Fleet Corp.* (280 U.S. 320), that the remedy under the Suits in Admiralty Act is exclusive."

[7] Even if the exclusivity provision were read to have incorporated only the *Cosmopolitan* decision, petitioners' position would not be far advanced. For under that decision the requirement of suing the United States is not confined to the general agent situation. The broad test set forth in *Cosmopolitan* is "whose enterprise the operation of the vessel was." 337 U.S. at 795. As the district court found (Pet. App. 39), the USNS POTOMAC was clearly engaged on an enterprise of the United States Government. Carrying military cargo to a terminal designated by the Department of Defense, and subject to the detailed control of the United States in the planning and conduct of her voyages, the USNS POTOMAC was being operated as a public vessel of the United States entitled to the immunities and privileges of Government vessels (Gov't App. 7a). In no sense can this be said to have been an enterprise of Marine Transport rather than the United States.

eral agent" to the more general term "agent" could not have escaped Congress.

3. The decision below is not in conflict with any decision of another circuit.[a] *Petition of the United States*, 259 F. 2d 608 (C.A. 3), decided only that an operating agent of a public vessel was an "owner" entitled to petition for limitation of liability, the pertinent statute defining "owner" as "[t]he charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement" (46 U.S.C. 186). Contrary to the view of the dissenting opinion below, there is nothing inconsistent with an "agent" under the Suits in Admiralty Act meeting the requirements for filing a limitation petition. The determination of whether a party is entitled to petition for limitation is a preliminary matter not intended to be dispositive of the merits of defenses such as the defense here involved. Both *Atlantic Coast Line R. Co.* v. *Agwilines, Inc.*, 195 F. 2d 459 (C.A. 5), and *Hanlon* v. *Waterman Steamship Corp.*, 265 F. 2d 206 (C.A. 2), certiorari denied, 361 U.S. 822, were decisions holding that the exclusivity statute barred recovery against a general agent, and so did not involve the question whether the statute applies to operating agents.

4. The question presented is of limited importance.

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[a] The decision below is in conflict with the district court decision in *Petition of Oskar Tiedemann and Company, etc.*, 236 F. Supp. 895, 898–99, 900–901 (D. Del.), pending on appeal as C.A. 3, Nos. 15203, 15280, 15281, 15293, and 15294.

We are advised by the Department of the Navy that, as of June 30, 1965, there were only 30 vessels operated for the Navy under contract: 20 tankers with a civilian complement of 41 to 45 crew members and officers, and 10 other vessels with a civilian complement ranging from 40 to 89 crew members and officers. Although the particular form of contract involved in the instant case has been in use since 1948, the present case is the only appellate case of which we are aware involving the application of the exclusivity provision of the Suits in Admiralty Act to this form of contract, with the exception of the case now pending in the Third Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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